

GORDON & REES LLP

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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GABINO HERNANDEZ, *on behalf of himself,*
FLSA Collective Plaintiffs and the Class,

Plaintiff,

Index No. 12 CV 7794

- against -

ANSWER

BARE BURGER DIO INC., BAREBURGER, INC.,
BAREBURGER GROUP LLC, GEORGE RODAS,
GEORGIOS DELLIS, and EFTYCHIOS PELKANOS

Defendants.

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Defendants, Bare Burger Dio Inc., BareBurger, Inc., BareBurger Group LLC, Georgios Rodas (misspelled by Plaintiff), Georgios Dellis, and Euripedes Pelekanos (the “Defendants”), by and through their attorneys, GORDON & REES, LLP, in their Answer to the Class and Collective Action Complaint (the “Complaint”) of plaintiff, Gabino Hernandez (“Plaintiff”), state upon information and belief:

AS TO “INTRODUCTION”

1. Defendants deny paragraph “1” of the Complaint as Plaintiff is not entitled to recover damages from Defendants pursuant to the Fair Labor Standards Act, as amended, 29 U.S.C. §§201 et. seq. (“FLSA”).

2. Defendants deny paragraph “2” of the Complaint as Plaintiff is not entitled to recover damages from Defendants pursuant to the New York Labor Law (“NYLL”).

AS TO “JURISDICTION AND VENUE”

3. Defendants admit the allegations contained in paragraph “3” of the Complaint.

4. Defendants admit the allegations contained in paragraph “4” of the Complaint.

AS TO “PARTIES”

5. Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph “5” of the Complaint.

6. Defendants admit the allegations contained in paragraph “6” of the Complaint.
(THE LAST SENTENCE OF THIS PARAGRAPH WE NEED TO CONFIRM WITH THE CLIENT.)

7. Defendants admit the allegations contained in paragraph “7” of the Complaint.

8. Defendants admit the allegations contained in paragraph “8” of the Complaint.

9. Defendants admit that they have hired managers who do the hiring, firing and scheduling of employees, but deny the remainder of paragraph “9” of the Complaint.

10. Paragraph “10” of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations contained in paragraph “10” of the Complaint.

11. Defendants deny the allegations in paragraph “11” of the Complaint.

AS TO “FLSA COLLECTIVE ACTION ALLEGATIONS”

12. Paragraph “12” of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations contained in paragraph “12” of the Complaint.

13. Defendants deny the allegations contained in paragraph “13” of the Complaint.

14. Paragraph “14” of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations contained in paragraph “14” of the Complaint.

AS TO “RULE 23 CLASS ALLEGATIONS – NEW YORK”

15. Paragraph “15” of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations contained in paragraph “15” of the Complaint.

16. Defendants deny the allegations contained in paragraph “16” of the Complaint.

17. Defendants deny the allegations contained in paragraph “17” of the Complaint.

18. Defendants deny the allegations contained in paragraph “18” of the Complaint.

19. Defendants deny the allegations contained in paragraph “19” of the Complaint.

20. Defendants deny the allegations contained in paragraph “20” of the Complaint.

21. Defendants deny the allegations contained in paragraph “21” of the Complaint.

22. Defendants deny the allegations contained in paragraph “22” of the Complaint, including subparts a) – l) of paragraph “22”.

AS TO “STATEMENT OF FACTS”

23. Defendants admit the allegations in paragraph “23” of the Complaint.

24. Defendants deny the allegations contained in paragraph “24” of the Complaint.

25. Defendants deny the allegations contained in paragraph “25” of the Complaint.

26. Defendants deny the allegations contained in paragraph “26” of the Complaint.

27. Defendants deny the allegations contained in paragraph “27” of the Complaint.

28. Defendants deny the allegations contained in paragraph “28” of the Complaint.

29. Defendants deny the allegations contained in paragraph “29” of the Complaint.

30. Defendants deny the allegations contained in paragraph “30” of the Complaint.

31. Defendants deny the allegations contained in paragraph “31” of the Complaint.

32. Defendants deny the allegations contained in paragraph “32” of the Complaint.

33. Defendants deny the allegations contained in paragraph “33” of the Complaint.

34. Defendants deny the allegations contained in paragraph “34” of the Complaint.

35. Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph “35” of the Complaint.

**AS TO “STATEMENT OF CLAIM - COUNT I -
VIOLATION OF THE FAIR LABOR STANDARDS ACT”**

36. In response to Paragraph 36 of the Complaint, Defendants repeat and re-allege their responses to Paragraphs 1 through 35 as fully set forth herein.

37. Paragraph “37” of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations contained in paragraph “37” of the Complaint.

38. Paragraph “38” of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations contained in paragraph “38” of the Complaint.

39. Defendants Bare Burger Dio Inc., and BareBurger Group LLC admit the allegations contained in paragraph “39” of the Complaint, however BareBurger, Inc., denies the allegation.

- 40. Defendants deny the allegations contained in paragraph “40” of the Complaint.
- 41. Defendants deny the allegations contained in paragraph “41” of the Complaint.
- 42. Defendants deny the allegations contained in paragraph “42” of the Complaint.
- 43. Defendants deny the allegations contained in paragraph “43” of the Complaint.
- 44. Defendants deny the allegations contained in paragraph “44” of the Complaint.
- 45. Defendants deny the allegations contained in paragraph “45” of the Complaint.
- 46. Defendants deny the allegations contained in paragraph “46” of the Complaint.
- 47. Defendants deny the allegations contained in paragraph “47” of the Complaint.
- 48. Defendants deny the allegations contained in paragraph “48” of the Complaint.

AS TO “COUNT II
VIOLATION OF THE NEW YORK LABOR LAW”

49. In response to Paragraph 49 of the Complaint, Defendants repeat and re-allege their responses to Paragraphs 1 through 48 as fully set forth herein

50. Paragraph “50” of the Complaint states a legal conclusion to which no response is required. To the extent a response is required, Defendants deny the allegations contained in paragraph “50” of the Complaint.

- 51. Defendants deny the allegations contained in paragraph “51” of the Complaint.
- 52. Defendants deny the allegations contained in paragraph “52” of the Complaint.
- 53. Defendants deny the allegations contained in paragraph “53” of the Complaint.
- 54. Defendants deny the allegations contained in paragraph “54” of the Complaint.
- 55. Defendants deny the allegations contained in paragraph “55” of the Complaint.
- 56. Defendants deny the allegations contained in paragraph “56” of the Complaint.

AS TO “PRAYER FOR RELIEF”

Defendants deny the allegations contained in the “WHEREFORE” paragraph of the Complaint.

In addition, except as expressly admitted above, Defendants deny any and all remaining allegations in the Complaint. Defendants further deny that Plaintiffs are entitled to any of the relief sought in paragraphs (a.) through (l.) under “Prayer for Relief” section of the Complaint.

AFFIRMATIVE DEFENSES

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

The Complaint and each count therein, fails to set forth facts sufficient to constitute a cause of action upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

The Complaint is subject to immediate dismissal as it is not ripe for adjudication.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

Some or all of Plaintiffs’ claims are barred by virtue of the equitable defense of the doctrine of laches.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

The Complaint is barred as against public policy.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

Defendants have conducted their practices in good faith and in accordance with all applicable statutes and regulations with regard to Plaintiffs. Defendants have not acted in bad faith or willfully or otherwise violated Plaintiffs’ rights in any manner or acted maliciously with respect to any aspect of the events underlying the Complaint.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

Some or all of Plaintiffs' alleged claims are barred by failure to exhaust administrative remedies.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction with respect to some or all of Plaintiffs' alleged claims.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs are not entitled to liquidated and/or punitive damages.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

Some or all of the actions forming the basis of Plaintiffs' alleged claims were committed by individuals outside the scope of their employment and cannot be imputed to Defendants as a matter of law.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

Plaintiffs fail to plead the elements of a Cause of Action based on the Fair Labor Standards Act, and as such, no relief can be granted.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE

Plaintiffs fail to plead the elements of a Cause of Action based on the Violations of the New York Labor Law, and as such, no relief can be granted.

AS AND FOR AN TWELFTH AFFIRMATIVE DEFENSE

This action is barred by the Statute of Limitations.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiffs failed to mitigate, obviate, diminish or otherwise act to lessen or reduce the injuries, damages and disabilities alleged in the Complaint.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE

Any damages allegedly incurred by Plaintiffs are the result of their own actions or omissions, and were not caused, in whole or in part, by the alleged actions or omissions of Defendants.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrine of estoppel.

AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrine of waiver.

AS AND FOR A SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrine of unclean hands.

AS AND FOR A EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' Complaint, and each count therein, fails to state facts sufficient to allow Defendants to identify all potential affirmative defenses, and Defendants therefore reserve the right to assert or argue any and all affirmative defenses, as those defenses become apparent through discovery in this action.

WHEREFORE, the Defendants herein demand judgment dismissing the Complaint in its entirety, together with such costs, expenses, disbursements and attorneys fees associated with this action, and such other and further relief as this court deems just and proper.

Dated: New York, New York
December 7, 2012

Respectfully Submitted,
GORDON & REES, LLP

By:

/s/ Ronald A. Giller

Ronald A. Giller

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Michael J. Vollbrecht

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